



SENATE REPUBLICAN

POLICY COMMITTEE

Legislative Notice

No. 49

March 3, 2008

S. 2663 – The CPSC Reform Act

Calendar No. 582

S. 2663 was read twice and placed on the Senate Calendar on February 26, 2008.

Noteworthy

- S. 2663 authorizes increased spending levels for the Consumer Product Safety Commission, provides for additional staff for the CPSC, provides employees of private sector firms with certain whistleblower protections, adds two Commissioners, provides for increased fines, requires third-party testing of children's products, authorizes state attorneys general to enforce CPSC standards, bans lead in children's products, and requires the CPSC to establish a database of consumer product incident information.
- S. 2663 retains much of the contents of S. 2045, the Consumer Product Safety Commission Reform Act of 2007, which was reported from the Committee on Commerce, Science, and Transportation on December 5, 2007. S. 2663 contains slightly higher authorization levels and decreased aggregated maximums for civil penalties, and modifies the state attorneys general provision. S. 2663 also changes some of the timelines under which the whistleblower provisions in Section 21 function, and eliminates the provision awarding whistleblowers a portion of collected penalties.
- The Statement of Administration Policy (SAP) for S. 2663 notes the Administration's support for certain portions of the bill. It also notes that it is "strongly opposed" to the State AG enforcement provisions, the provision creating a publically-available database, and the whistleblower provisions in Section 21. The SAP does not threaten a veto.
- The House passed H.R. 4040, the Consumer Product Safety Modernization Act, on December, 19, 2007 by a vote of 407-0.
- The Congressional Budget Office has not issued a score for S. 2663. CBO estimated that implementing S. 2045 would increase spending subject to appropriation by \$447 million over the FY 2009-2012 period, assuming appropriation of the specified amounts. CBO estimated that S. 2045 would increase federal revenues by \$17 million over the FY 2008-

2012 period, and \$48 million over the FY 2008-2017 period because of increased civil penalties. CBO estimated that the bill would not affect direct spending.

Background

Creation and Mission.

Passage of the Consumer Product Safety Act (CPSA) of 1972 established the Consumer Product Safety Commission as an independent federal health and safety regulatory agency. Its missions include: protecting the public against unreasonable risks of injury associated with consumer products; assisting consumers in evaluating the comparative safety of consumer products; developing uniform safety standards for consumer products (and minimizing conflicting state and local regulations); and promoting research and investigation into causes for, and prevention of, consumer products-related deaths, illnesses, and injuries. The Commission enforces the CPSA and several additional statutes, including the Federal Hazardous Substances Act (15 U.S.C. 1261) (FHSA); the Flammable Fabrics Act (15 U.S.C. 1191) (FFA); and the Poison Prevention Packaging Act (15 U.S.C. 1471) (PPPA).

Employees, Staff and Budget.

The CPSC employs approximately 400 full-time employees (FTEs). With this workforce, the Commission pursues its mission by working with industry to develop voluntary standards, conducting research, and securing recalls of products deemed unsafe or making arrangements for product repair.

The president's fiscal year (FY) 2008 budget proposed to fund 401 FTEs, and to provide \$63.25 million to operate the agency. Funding for the CPSC has remained essentially flat for FY 2005 through FY 2007; staff levels have decreased by 31 FTEs in FY 2006 and approximately 20 FTEs in FY 2007. The Consolidated Appropriations Act of 2008 contains \$80 million for the operation of the CPSC for FY 2008.

Consumer Product Safety.

A series of high-profile nationwide recalls of noncompliant products, including many imported from China, have driven increased public scrutiny in consumer product safety generally and prompted some to call for the strengthening and overhaul of the consumer product safety system. S. 2663 contains provisions meant to meet a series of challenges presented by these incidents and generally by the rapidly proliferating flow of millions of consumer products manufactured both in the United States and abroad. The bill significantly increases the authorized level of funding at CPSC, for example: As noted, CPSC was most recently funded at \$80 million for FY 2008 and the bill increases the authorization level to about \$155 million in FY 2015. The bill also mandates that by 2013, the CPSC add about 100 employees, including inspectors at ports of entry in the United States. It creates a joint enforcement regime with the states by permitting state attorneys general to seek injunctive relief on behalf of their residents. Civil and criminal penalties are both increased; aggregated maximums in S. 2663 are raised from \$1.8 million to

\$10 million, and to \$20 million under aggravating circumstances. S. 2663 also establishes a process under which employees will be protected from retaliatory action by their employer should they refuse to engage in certain activities the employee believes are unlawful. In an effort to facilitate rapid removal of subject products from commerce, S. 2663 also mandates that a database be established to chronicle adverse event reporting, and that consumer products bear a tracking mark to make them identifiable as they flow throughout the channels of commerce and into consumers' hands.

Bill Provisions

Section 3: Reauthorization.

Authorizes funding of the Consumer Product Safety Commission (CPSC or Commission) at the following levels: \$88,500,000 for Fiscal Year (FY) 2009; \$96,800,000 for FY 2010; \$106,480,000 for FY 2011; \$117,128,000 for FY 2012; \$128,841,000 for FY 2013; \$141,725,000 for FY 2014; and \$155,900,000 for FY 2015.

R&D and Facilities:

\$40 million for use in FY 2009 and FY 2010 for CPSC laboratories and \$1 million in FY 2009 and FY 2010 for research into the safety impact of nanotechnology in consumer products.

CPSC Office of the Inspector General funding specified:

\$1,600,000 for FY 2009; \$1,770,000 for FY 2010; \$1,936,000 for FY 2011; \$2,129,600 for FY 2012; \$2,342,560 for FY 2013; \$2,576,820 for FY 2014; and \$2,834,500 for FY 2015.

Section 4: Personnel.

Requires full-time personnel to be increased to at least 500 by October 1, 2013. Ports of entry personnel must number at least 50. Requires a professional development program.

Section 5: Full Commission Requirement; Interim Quorum.

Repeals the limit on the use of appropriated funds for more than three Commissioners. Allows 2 Commissioners, if they are not affiliated with the same political party, to constitute a quorum for the transaction of business for the 9-month period beginning on the date of enactment.

Section 6: Submission of Copy of Certain Documents to Congress.

Requires the CPSC to concurrently submit to Congress any budget or legislative recommendations, testimony or comments on legislation sent to the president or to the Office of Management and Budget.

Section 7: Public Disclosure of Information.

Product Specific information:

Shortens from 15 to 30 days the deadline by which a company must respond when the CPSC notifies the manufacturer that information concerning the company's product will

be released to the public. CPSC may shorten the notification period if public health and safety require it.

Database:

Within one year, the CPSC must establish a searchable database on its website to include any reports of injury, death, or risk of injury or death submitted by consumers, health care professionals, child service providers, public safety entities, government agencies, and other non-governmental sources. The CPSC must categorize the contents of the database by date, product, manufacturer, and product model. Any report submitted to the CPSC must be displayed on the database within 15 days. If a CPSC investigation finds that a report was incorrect, the CPSC will be required to remove it. If requested, manufacturer comments could be included alongside the information provided in the database.

Section 8: Rulemaking.

Revises the CPSC's rulemaking procedures under the CPSA, Federal Hazardous Substances Act (FHSA), and the Flammable Fabrics Act (FFA) to make permissive the current requirement that the CPSC issue an advanced notice of proposed rulemaking before issuing a notice of proposed rulemaking.

Section 9: Prohibition on Stockpiling Under Other Commission-Enforced Statutes.

Authorizes the Commission to prohibit, by rule, a manufacturer from stockpiling a product that is subject to a rule under the CPSA or any other law enforced by the CPSC.

Section 10: Third Party Certification.

Requires within 60 days that every manufacturer of a children's product which is subject to a children's product safety standard have the product tested by a qualified non-governmental independent third party; certify that such product conforms to such standard; and specify the applicable children's product safety standard.

Section 11: Tracking Labels for Products for Children; Advertising.

Tracking Capability:

Manufacturers of children's products are required within one year to place distinguishing marks on the product or its packaging that would enable the purchaser to ascertain the manufacturer, production time period, and cohort (including the batch, run number, or other identifying characteristic) of production of the product by reference to those marks.

Internet and Catalog:

Any advertisement posted by a manufacturer, retailer, distributor, private labeler, or licensor for any toy, game, balloon, small ball, or marble that requires a cautionary statement must include the cautionary statement in its entirety on or immediately adjacent to the ad. The requirement applies to retailer ads only if the retailer is affirmatively advised by the manufacturer that a cautionary statement is required.

Section 12: Substantial Product Hazard Reporting Requirement.

Extends the reporting requirement currently applicable to products covered by rules and standards under the CPSA to cover products and substances covered by rules and standards

under acts such as the FHSA.

Section 13: Corrective Action Plans.

Provides the Commission the authority to approve of a corrective action plan it determines to be in the public interest instead of allowing the manufacturer to select the corrective action plan it believes appropriate.

Section 14: Identification of Manufacturer by Importers, Retailers, and Distributors.

Requires every importer, retailer, or distributor of a consumer product or other product under the Commission's jurisdiction to identify the manufacturer of that product by name, address, or such other identifying information as the Commission may request to the extent that the information is known, or can be determined, by the importer, retailer, or distributor.

Section 15: Prohibited Acts.

Makes it unlawful for any person to sell, offer for sale, manufacture for sale, distribute in commerce, or import into the United States any consumer product that violates an applicable consumer product safety standard, is subject to a voluntary corrective action taken by the manufacturer of which action the CPSC has notified the public, or is subject to an order for a banned hazardous substance. Authorizes the Commission to prohibit a person from exporting from the United States any product or substance regulated by the Commission if: the Commission determines is not in conformity with an applicable product safety standard and does not violate applicable safety standards established by the importing country; has been designated a banned hazardous substance; or is subject to voluntary corrective action taken by the manufacturer and would have been subject to a mandatory corrective action by the CPSC. The Commission may permit the export of the product if it meets the safety standards of the importing country. Makes unlawful commerce in products bearing a safety certification mark not authorized by the relevant body. Makes it unlawful to misrepresent to any officer or employee of the Commission the scope of consumer products subject to a corrective action or to make a material misrepresentation to such an officer or employee in the course of an investigation under this Act. Makes unlawful the exercise or the attempt to exercise undue influence on a third party lab.

Section 16: Penalties.

Civil Penalties:

Aggregated maximums are increased from \$1.825 million to \$20 million (with aggravating circumstances).

Imprisonment:

Knowing and willful violations are made punishable by imprisonment of up to 5 years.

Criminal Penalties:

Criminal penalties can include forfeiture of assets.

Criminal fines would be determined under the "Sentence of a fine" section of 18 U.S.C. sec. 3571.

CPSC Penalty Rulemaking:

Requires CPSC to adopt penalty policy within one year.

Section 17: Preemption.

Applicable preemption sections of existing law may not be expanded in scope, or limited, modified or extended in application, by any CPSC rule or regulation.

Section 18: Sharing of Information with Federal, State, Local, and Foreign Law Enforcement Agencies.

Authorizes the Commission to make certain information it obtains available to any federal, state, local, or foreign law enforcement agency upon the prior certification that such material will be maintained in confidence and will be used only for official law enforcement or consumer protection purposes, provided: (a) the agency has set forth a bona fide legal basis for its authority to maintain the material in confidence; and (b) the materials are to be used for purposes of investigating or enforcing violations of product safety laws, will aid the CPSC's investigation, or, with the approval of the U.S. Attorney General, aid in investigating an offense covered by a criminal mutual legal assistance treaty.

Section 19: Financial Responsibility.

Authorizes the Commission to establish procedures to require manufacturers or distributors of a consumer product to provide security acceptable to the Commission in an amount sufficient to cover the costs of an effective recall of the product or substance or to cover the costs of holding the product or substance, and destruction of the product or substance should such action be required by the Commission.

Section 20: Enforcement by State Attorneys General.

The attorney general (AG) of a state may bring an action based on the belief that the interests of the residents have been, or are being, threatened or adversely affected by a CPSC violation.

Notice to CPSC:

If feasible, the state would be required to serve written notice to the CPSC of any civil action at least 60 days prior to initiating such civil action.

CPSC Role:

Upon notice, the CPSC may intervene in the civil action.

Suit Barred:

A state may not initiate an action during pendency if the CPSC has instituted a similar civil or administrative action.

Injunctive relief:

State AGs may sue for injunctive relief in federal court.

Venue:

District in which the manufacturer, distributor, or retailer was authorized to do business.

Recovery/Attorney's Fees:

If a state AG prevails in any civil action, it is authorized to recover reasonable costs and attorney fees from the manufacturer, distributor, or retailer.

Section 21: Whistleblower Protection for Manufacturers' Employees.

Protected Acts:

An employee may not be acted against by an employer if the individual provides or is about to provide information regarding a violation; testifies regarding violations; assists in either providing information or testifying; or does not participate in a task believed to be a violation of CPSC standards.

Procedures:

An employee believing he has been the subject of discrimination may file a complaint with the Department of Labor (DOL) within 180 days. If DOL finds a violation, the violator must take action to rectify the violation, reemploy the complainant, and provide compensatory damages. If DOL has not issued a final decision within 210 days after the complaint is filed, the employee may file suit in federal court for unlimited compensatory and consequential damages, as well as punitive damages. Punitive damages are capped at \$250,000. If a case is found to be frivolous or brought in bad faith, employers may be awarded reasonable fees not more than \$1,000. A successful action by an employee would also constitute violation by the employer of the CPSA, making the employer liable for civil penalty.

Section 22: Ban on Children's Products Containing Lead.

Products:

Beginning one year after the date of enactment, any children's product containing lead would be treated as a banned hazardous substance under the FHSA. A children's product would be considered to contain lead if: any part of the product contains lead or lead compounds and the lead content of such part (calculated as lead metal) is greater than .03 percent by weight of the total weight of such part (or lesser amount as may be established by the Commission by regulation). Three years after enactment, the permitted amount would be reduced to .01 percent, unless the Commission determines that a standard of .01 percent is not technologically feasible. If the CPSC determines that .01 percent is not feasible, it must set the standard at the lowest level between .03 percent and .01 percent that is feasible to achieve. The Commission would be able, by regulation, to establish lower thresholds for lead content in children's products than those set forth in this section as the Commission finds to be technologically feasible.

If the Commission determines that it is not feasible for certain electronic devices to comply with the prohibition, the Commission is authorized to issue standards to reduce the exposure of and accessibility of lead in such electronic devices, and to establish a schedule by which such electronic devices shall be in full compliance with the regulations.

Inaccessible parts:

If some portion a of children's product is not accessible to a child because it is not

physically exposed and will not become physically exposed through normal and reasonably foreseeable use and abuse of the product, the portion is not subject to this section.

Lead Paint:

Directs the CPSC, within one year after the date of enactment, to reduce the permissible lead level in consumer-use paint from “0.06 percent” to “0.009 percent.”

Section 23: Alternative Measures of Lead Content.

Requires the Commission, in cooperation with the National Academy of Sciences and the National Institute of Standards and Technology, to study the feasibility of establishing a measurement standard for lead content based on a units-of-mass-per-area standard that is statistically comparable to the parts-per-million measurement standard currently used in laboratory analysis.

Section 24: Study of Preventable Injuries and Deaths of Minority children Related to Certain Consumer Products.

Requires the Government Accountability Office (GAO) to initiate a study within 90 days to assess disparities in the risks and incidence of preventable injuries and deaths among children of minority populations, including Black, Hispanic, American Indian, Alaskan Native, and Asian/Pacific Islander children in the United States.

Section 25: Cost-Benefit Analysis Under the Poison Prevention Packaging Act (PPPA) of 1970.

Provides that nothing in the PPPA requires the Commission to prepare a comparison of the costs that would be incurred in complying with a standard under the act with the benefits of that same standard.

Section 26: Inspector General Reports.

Requires the Inspector General of the Commission to conduct reviews and audits of implementation of this legislation and report on those findings in an annual report to Congress.

Section 27: Public Interest Website Links.

Requires the Commission, not later than 30 days after the date of enactment, to establish and maintain a direct link on the homepage of its Internet website to the Internet website of the Office of the Inspector General of the Commission and a mechanism on the homepage of the Office of the Inspector General’s Internet website by which individuals may anonymously report cases of waste, fraud, or abuse with respect to the Commission.

Section 28: Child-Resistant Portable Gasoline Containers.

Establishes that each portable gasoline container for sale in the United States conform to the child resistance requirements as specified in the ASTM F2517-05 standard and its successors, unless the Commission determines otherwise.

Section 29: Toy Safety Standard.

Establishes the ASTM 963-07 standard for toy safety as a consumer product safety rule issued by

the Commission.

Section 30: All-Terrain Vehicle (ATV) Safety Standard.

Requires the Commission to publish in the Federal Register as a consumer product safety standard the standard by the Specialty Vehicle Institute of America in ANSI/SVIA-1-2007. After the standard takes effect, it would be unlawful to import or otherwise engage in commerce of new ATVs unless the vehicle complies with each applicable provision of the standard and is subject to or complying with an applicable ATV action plan filed with the Commission. Bans the import and distribution of 3-wheeled ATVs until a mandatory consumer product safety rule with respect to such vehicles is in effect. Requires that the Commission issue a final rule in its proceeding entitled “Standards for All-Terrain Vehicles and Ban of Three-Wheeled All-Terrain Vehicles.”

Section 31: Garage Door Opener Standard.

Requires that all automatic garage door openers that directly drive the door in the closing direction that are manufactured more than six months after the date of enactment include an external secondary entrapment protection device that does not require contact with the person or object for the door to reverse.

Section 32: Reducing Deaths and Injuries from Carbon Monoxide Poisoning.

Requires the Commission to issue a final rule regarding “Portable Generators.”

Section 33: Completion of the Cigarette Lighter Rulemaking.

Requires the Commission to issue a final rule mandating general safety standards for cigarette lighters.

Section 34: Consumer Product Registration Forms.

Requires the Commission, no later than one year after the date of enactment, to promulgate consumer product safety rules that require manufacturers of durable infant or toddlers’ products to provide consumers with postage-paid registration forms. Requires recordkeeping.

Section 35: Repeal.

Section 30 (15 U.S.C. 2079) is amended by striking subsection (d) and redesignating subsections (e) and (f) as subsections (d) and (e), respectively.

Section 36: Consumer Product Safety Commission presence at National Targeting Center of U.S. Customs and Border Protection.

Gives the CPSC authority to assign CPSC personnel to the National Targeting Center at Customs and Border Protection (CBP), to facilitate information exchange to stop the importation of products that pose a high risk to consumer safety.

Section 37: Development of risk assessment methodology to identify shipments of consumer products that are likely to contain consumer products in violation of safety standards.

Directs the CPSC to develop a comprehensive risk assessment methodology for screening noncompliant imported consumer products. The methodology developed by the CPSC shall conform to the International Trade Data System to the extent practicable.

Section 38: Seizure and destruction of imported products in violation of consumer product safety standards.

Six months after the date of enactment, the CPSC shall publish and update a list of product defects that constitute a substantial product hazard. The list shall be provided to the Secretary of Homeland Security.

Section 39: Database of manufacturing facilities and suppliers involved in violations of consumer product safety standards.

Requires the CPSC to create a database documenting violations of consumer product safety rules. The database is to contain: (1) the date of the violation; (2) a description of the violation; (3) details of the act or omission that constituted the violation; and (4) identifying information about the manufacturing facility or supplier.

Administration Position

The SAP for S. 2663 notes the Administration's support for certain portions of the bill. It also notes that it is "strongly opposed" to the state AG enforcement provisions, the provision creating a publically-available database, and whistleblower provisions in Section 21.¹

Cost

The Congressional Budget Office has not issued a score for S. 2663. CBO estimated that implementing S. 2045 would increase spending subject to appropriation by \$447 million over the FY 2009-2012 period, assuming appropriation of the specified amounts. CBO estimated that S. 2045 would increase federal revenues by \$17 million over the FY 2008-2012 period and \$48 million over the FY 2008-2017 period because of increased civil penalties. CBO estimated that the bill would not affect direct spending.

CBO estimated that the cost to state and local governments of complying with the whistleblower provisions in S. 2045 would be small and would not exceed the threshold established in the Unfunded Mandates Reform Act (UMRA).

CBO estimated the cost to manufacturers, retailers, distributors and importers to exceed the annual threshold established in UMRA.

¹ <http://www.whitehouse.gov/omb/legislative/sap/110-2/saps2663-s.pdf>

CBO expected that increasing the maximum for civil penalties would “change the dynamics of litigating and settling large cases and estimates that the average penalty for larger cases would eventually double.”

Possible Amendments

Amendments addressing the following issues are anticipated:

- Whistleblower provisions;
- State AG enforcement;
- Product information/database provisions;
- Attorneys fees;
- Complaint verification;
- Fines/penalties;
- Additional product-specific restrictions;
- Helmets; and
- CPSC travel.